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IN THE

Supreme Court of the United States

VISA U.S.A. INC. AND
MASTERCARD INTERNATIONAL INCORPORATED,
Petitioners,

v.

WAL-MART STORES, INC., *et al.*,
Respondents.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Second Circuit

BRIEF OF AMERICAN BANKERS ASSOCIATION, THE CONSUMER BANKERS ASSOCIATION, THE FINANCIAL SERVICES ROUNDTABLE, THE INDEPENDENT COMMUNITY BANKERS OF AMERICA, AMERICA'S COMMUNITY BANKERS, THE DELAWARE BANKERS ASSOCIATION, THE NEW MEXICO BANKERS ASSOCIATION, THE NEW YORK BANKERS ASSOCIATION, THE NEW YORK CLEARING HOUSE ASSOCIATION L.L.C., THE NORTH CAROLINA BANKERS ASSOCIATION, THE OKLAHOMA BANKERS ASSOCIATION, AND THE SOUTH CAROLINA BANKERS ASSOCIATION AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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INTEREST OF THE *AMICI CURIAE*

With the consent of the parties pursuant to Rule 37 of the Rules of this Court, the American Bankers Association, the Consumer Bankers Association, the Financial Services Roundtable, the Independent Community Bankers of America, America's Community Bankers, the Delaware Bankers Association, the New Mexico Bankers Association, the New York Bankers Association, The New York Clearing House Association L.L.C., the North Carolina Bankers Association, the Oklahoma Bankers Association, and the South Carolina Bankers Association, submit this brief as *amici curiae* in support of the petition for a writ of certiorari.[1] Together, the *amici* state and national banking associations represent many of the financial institutions that, as participants in Petitioners' Visa and MasterCard payment systems, issue Visa and/or MasterCard credit and debit cards and process credit and debit transactions at issue in this case.

The American Bankers Association (ABA) is the principal national trade association of the banking industry in the United States. Its members are located in each of the fifty states and the District of Columbia and include banks of all sizes offering various financial services. ABA

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[1] The parties' letters of consent have been lodged with the Clerk of the Court. Pursuant to Rule 37.6, counsel for *amici curiae* certify that no counsel for a party authored this brief in whole or in part, and no person or entity other than *amici curiae*, their members, or their counsel has made a monetary contribution to this brief's preparation or submission. Many of the financial institutions that are members of the *amici curiae* banking associations, including those financial institutions that contributed financially to this brief's preparation and submission, participate, like thousands of banks throughout the United States, in Petitioners' Visa and MasterCard payment systems.

members hold approximately ninety percent of the domestic assets of the United States banks. The ABA frequently appears as an *amicus curiae* in cases that raise issues of widespread concern to banks or consumers of banking services.

The Consumer Bankers Association (CBA) was founded in 1919 to provide a collective voice for the retail banking industry. The CBA represents over 750 federally insured banks and thrift institutions that hold more than eighty percent of all consumer deposits and more than seventy percent of all consumer credit held by federally insured depository institutions in the United States. The CBA regularly monitors the impact that consumer issues have on retail banks.

The Financial Services Roundtable (the "Roundtable") is a national association whose membership represents 100 of the largest integrated financial services companies providing banking, insurance, and investment products and services to the American consumer. Member companies participate through their respective chief executive officers and other senior executives. Roundtable member companies account for $17 trillion in managed assets and $462 billion in revenue and provide 1.6 million jobs.

The Independent Community Bankers of America (ICBA) represents community banks and community financial institutions. The ICBA's membership includes some 5,000 community banks which hold more than $511 billion in insured deposits, $624 billion in assets, and more than $391 billion in loans for consumers and small businesses.

America's Community Bankers (ACB) is the national trade association for nearly 1,200 community

banks of all charter types and sizes. ACB members, whose aggregate assets exceed one trillion dollars, pursue progressive, entrepreneurial, and service-oriented strategies in providing financial services to benefit their customers and communities.

The members of the Delaware Bankers Association (DBA) are national and state-chartered commercial banks, trust companies, and savings banks that hold assets in, or are authorized to accept deposits in, the state of Delaware. The DBA assists its member financial institutions with compliance concerns, governmental relations, education, and community outreach.

The New Mexico Bankers Association (NMBA) is a trade organization representing a broad membership of commercial banks and savings and loans. Its membership accounts for over ninety percent of banking assets in New Mexico. The NMBA provides its members with governmental relations, legal compliance, communications, and education services.

The New York Bankers Association is comprised of community, regional, and money center commercial banks in the State of New York, including approximately 55% state-chartered banks and 45% national banks, which in the aggregate have over 210,000 employees and assets in excess of one trillion dollars.

The New York Clearing House Association L.L.C. (the "Clearing House") is an association of eleven of the nation's leading commercial banks. The members of the Clearing House are Bank of America, National Association; The Bank of New York; Bank One, National Association; Citibank, N.A.; Deutsche Bank Trust Company Americas; Fleet National Bank; HSBC Bank USA; JPMorgan Chase Bank; LaSalle Bank National

Association; Wachovia Bank, National Association; and Wells Fargo Bank, National Association. The Clearing House regularly files *amicus* briefs on issues that are of broad industry concern.

The North Carolina Bankers Association (NCBA) is a trade group that was established in 1897 and now consists of 137 North Carolina financial institutions. The NCBA provides regulatory and compliance assistance and other services to its member financial institutions, and serves as a liaison between its members and the federal and state legislatures and regulators.

The Oklahoma Bankers Association (OBA) was created in 1897 and now serves nearly 290 Oklahoma member banks. The OBA assists its members with legal and compliance services, government relations, communications, and other areas of common concern.

The South Carolina Bankers Association (SCBA) is a professional trade association representing the financial services industry in South Carolina. The SCBA has represented the common interest and welfare of South Carolina banks and thrift institutions for 101 years.

SUMMARY OF ARGUMENT

A. For over four decades, the credit card and debit card payment systems developed by Visa, MasterCard, and other financial networks have contributed substantially to America's economic growth. Without convenient, fast, and secure card payment systems, many of the kinds of transactions that take place by the thousands every minute in stores, over the telephone, and over the Internet would be impossible.

The instant class action is an attempt to effect a broad restructuring of credit card and debit card pricing policies through a single lawsuit. Respondents have endeavored to amass a plaintiff class consisting of more than four million merchants in the United States retail industry and to pit this enormous class against the country's two largest card payment systems, each of which has thousands of participating banks that issue credit and debit cards and process card transactions. Respondents understandably chose as the forum for this lawsuit a district court within the Second Circuit, given that the standards for certification in the Second Circuit are among the most permissive in the nation.

As a result of the class certification in this case, absent this Court's intervention, the future debit and credit card pricing policies of the nation's two predominant card payment systems are likely to be determined not through commercial negotiation between merchants and the payment systems, or through carefully constructed regulatory measures, but through a coerced settlement. The motivation for this settlement will not be the merits of the claims underlying this lawsuit, but the staggering potential liability that the Petitioners face as a result of the accumulation of millions of claimants in a single lawsuit. *See* Pet. App. 36a (Jacobs, J., dissenting). Respondents' effort to use the class action device to change the operations of thousands of financial institutions that participate in the Visa and MasterCard payment systems highlights the dangers inherent in the Second Circuit's erroneous class certification standards. Those standards too easily permit the cobbling together of industry-wide classes, with potentially devastating economic effects for individual companies or whole industries.

B. The certification standards that the district court and the Second Circuit applied in this case conflict with the plain meaning of Rule 23 of the Federal Rules of Civil Procedure, with this Court's recent class certification decisions, and (as set forth in the Petition) with the interpretation of the Rule by other circuit courts of appeals. According to the Second Circuit, a district court should certify a class if the evidence in favor of certification is not "fatally flawed" and is "sufficient" to fulfill Rule 23's certification criteria—whether or not such evidence in favor of certification is persuasive. The court of appeals thus affirmed the district court's class certification based on the erroneous view that a district court should not weigh conflicting expert evidence.

Rule 23(b)(3), however, allows a district court to certify a class action only if the court "finds" that common questions of law or fact predominate and that the class action method is superior to other available methods of adjudication. Fed. R. Civ. P. 23(b)(3). The Rule also lists four factors as "[t]he matters pertinent to the findings." *Id.* The Rule's repeated use of the word "find" calls for the weighing of competing evidence offered in connection with the (b)(3) criteria. In both of this Court's most recent class certification decisions, *Amchem Products, Inc. v. Windsor*, 521 U.S. 591 (1997), and *Ortiz v. Fibreboard Corp.*, 527 U.S. 815 (1999), this Court emphasized the close look that Rule 23 requires district courts to take in deciding on class certification. The Second Circuit's standards expressly avoid the searching scrutiny that the text of Rule 23 and this Court's decisions require.

The findings that Rule 23 demands are similar to other preliminary determinations that district courts routinely make, such as those under Rules 12(b)(1) and 12(b)(2), which may overlap to a certain degree with the

merits of a case. Any findings by a district court as to Rule 23 certification factors that overlap in some respects with merits issues need not be dispositive of those merits issues themselves. The weighing of competing evidence at the certification stage thus does not run counter to *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156 (1974). Rather, as several courts of appeals other than the Second Circuit have held, class certification must be based on critical evaluation of the parties' evidence regarding Rule 23's criteria.

ARGUMENT

THE COURT SHOULD GRANT REVIEW BECAUSE OF THE IMPORTANCE OF THIS CASE TO CARD PAYMENT SYSTEMS AND BECAUSE OF THE CONFLICT BETWEEN THE SECOND CIRCUIT'S CERTIFICATION STANDARDS AND THE RULINGS OF THIS COURT AND OTHER CIRCUITS.

A. The Certification Of The Plaintiff Class In This Case Improperly Threatens To Force Readjustment of Card Pricing Policies Affecting Thousands of Banks Through A Settlement Coerced By The Scope Of The Class Rather Than The Merits Of Plaintiffs' Claims.

The class certification that the Second Circuit affirmed in this case has the potential of coercing macro-level readjustment of payment card pricing policies through a settlement entered into as a result of the size of the plaintiff class, not because of the merits of the lawsuit. Granted without any finding that the evidence in favor of certification is more persuasive than the evidence against it, the certification of the plaintiff class here pits nearly the entire United States retail industry against Petitioners Visa and MasterCard, two payment systems upon which

thousands of banks and millions of consumers rely. If the class certification stands, the enormous potential liability facing Visa and MasterCard may leave them with no practical choice but to settle the millions of claims now amassed against them. Review by this Court is essential, not only to prevent a non-merits-based settlement of this litigation, but also to ensure that the Second Circuit and other federal courts apply proper class certification criteria.

1. Visa and MasterCard are both not-for-profit associations with thousands of participating banks and other financial institutions that annually handle billions of dollars in transactions using plastic cards for goods and services at a wide variety of retail establishments, as well as on the Internet, by telephone, and at automated teller machines. These card payment systems have transformed American and worldwide retail business over the last generation to the benefit of millions of consumers and small businesses.

Entire industries—including retail stores, airlines, catalog merchants, and electronic commerce—are dependent on the expansion of credit card and debit card use, not only because of the on-site retail transactions that such cards permit, but also because these card payment systems have made possible prompt and secure transactions between buyers and sellers at great distances from each other. *See, e.g.*, *Santa Fe Natural Tobacco Co., Inc. v. Spitzer*, No. 00 CIV. 7274, 7750, 2001 WL 636441, at *19 (S.D.N.Y. June 8, 2001) (90% of Internet sites require payment by credit card). These payment systems developed in perhaps the most highly—and most successfully—regulated sector of the economy. *See, e.g.*, *United States v. Philadelphia Nat'l Bank*, 374 U.S. 321, 330 (1963) (federal regulation of the banking industry is "'[p]robably the outstanding example in the federal

government of regulation of an entire industry through methods of supervision'") (quoting 1 Kenneth Culp Davis, *Administrative Law* § 4.04, at 247 (1958)) (alteration in original); *United States v. Winstar Corp.*, 518 U.S. 839, 844 (1996) ("We said in *Fahey* v. *Mallonee*, 332 U.S. 245, 250 (1947), that '[b]anking is one of the longest regulated and most closely supervised of public callings.'").

2. The class certification ruling below presents a grave risk that future pricing and availability of substantial segments of debit and credit payment services will be determined through settlement negotiations coerced by the potential liability now facing Visa and MasterCard in this lawsuit. The class certified below includes all persons or business entities that have accepted Visa and/or MasterCard credit and debit cards during the fullest period permitted by applicable statutes of limitations—a class consisting of approximately four million retail and other businesses. Pet. App. 5a, 35a-36a. The district court acknowledged that the potential liability facing Visa and MasterCard in the present class action is "enormous." Pet. App. 98a. As Judge Jacobs recognized in dissent, Petitioners' potential exposure could "coerce settlement" regardless of the merits of Respondents' claims. Pet. App. 36a.[2] *Cf. In re Bridgestone/Firestone, Inc., Tires Prods. Liab. Litig.*, Nos. 02-1437, 02-1438 & 02-1439, 2002 WL 831990, at *2 (7th Cir. May 2, 2002) (noting that the

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[2] Moreover, in the present case, class certification cannot be justified by any need to ensure a remedy for alleged wrongdoing. The named plaintiffs in this case include some of the largest retailers in the United States and, indeed, the nation's largest company of any kind. Several of the named plaintiffs have asserted huge damages claims in the lawsuit and are capable of efficiently prosecuting those claims in individual lawsuits against Visa and MasterCard.

aggregation of millions of disparate claims in a class action suit "makes the case so unwieldy, and the stakes so large, that settlement becomes almost inevitable—and at a price that reflects the risk of a catastrophic judgment as much as, if not more than, the actual merit of the claims").

Any such settlement would likely involve insistence by Respondents on prospective policy changes by Visa and MasterCard that would, in turn, require Visa's and MasterCard's thousands of participating banks, including members of the *amici* associations, to make important pricing changes. The macroeconomic consequences of such changes would be felt not only by the banks, but by the tens of millions of customers who rely on the card payment systems that Visa and MasterCard facilitate. Unlike the results of a single litigated case—which can be determined on the merits of the evidence presented—or the results of carefully planned governmental regulation, policy changes extracted from class action defendants through coerced settlements cannot be expected to depend on the merits of the underlying claims.

Banks are particularly susceptible to the effects of erroneous class certifications because of the banks' regulatory obligations to operate in accordance with safety and soundness standards, their responsibilities to their depositors and their communities, and their dependence on their reputation in order to retain their depositors and other customers. All of these factors militate in favor of settlement in the face of an erroneously certified class, even when the underlying action is of dubious merit.[3] The

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[3] *Amici* do not contend that the banking and financial services industries should be immune from class actions or antitrust claims. Rather, *amici* emphasize the necessity of a close look at the class

potential that banking policy changes could be coerced through erroneous class certification stands in stark contrast to the care with which Congress, federal agencies, and the states have regulated the financial services industries (or declined to regulate aspects of those industries).[4]

3. As illustrated in this case, the Second Circuit's improper certification standards allow plaintiffs seeking a tactical advantage to cobble together inappropriate industry-wide classes. Individual companies or whole industries named as defendants thereby face risks far greater than they safely can bear. A court's class certification in such a case without evaluating competing evidence regarding certification criteria essentially "amounts to a delegation of judicial power to the [class proponents]." *West v. Prudential Sec., Inc.*, 282 F.3d 935, 938 (7th Cir. 2002).

In light of the ease with which the Second Circuit's standards permitted certification of the four-million-member plaintiff class of retailers in this case, it is likely that, absent intervention by this Court, class action lawyers armed with "not-fatally-flawed" expert testimony regarding certification standards will regularly head to the Second Circuit in attempts to craft lawsuits in which whole industries face off in the district courts, rather than in legislative chambers or in the marketplace. The Second

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certification stage to ensure that such class actions are proper, and not improvidently allowed.

[4] Although Congress and the federal agencies charged with regulating banks have not chosen to regulate the contractual interchange fee provisions at issue in this case, Respondents' class action could have the practical effect of doing so by coercing policy changes through settlement.

Circuit's standards will thus exacerbate the existing tensions created by the "big business" of class actions and the attendant pressure to settle that has repeatedly been labeled, by the courts and others, as a form of "blackmail." *See* Aimee G. Mackay, Comment, *Appealability of Class Certification Orders Under Federal Rule of Civil Procedure 23(f): Toward A Principled Approach*, 96 Nw. U. L. Rev. 755, 756–57 (2002) [hereinafter Mackay, *Appealability*] ("Class actions are now 'big business,' and courts often criticize them as 'legalized blackmail.'") (citing *Castano v. American Tobacco Co.*, 84 F.3d 734, 746 (5th Cir. 1996) ("judicial blackmail"); *In re Gen. Motors Corp. Pick-Up Truck Fuel Tank Prods. Liab. Litig.*, 55 F.3d 768, 784 (3d Cir. 1995) ("legalized blackmail"); *In re Rhone-Poulenc Rorer Inc.*, 51 F.3d 1293, 1298 (7th Cir. 1995) (calling class action settlements "blackmail settlements")); *see also* Mackay, *Appealability* at 809 n.10 ("A recent survey of Fortune 500 companies found that from 1988 to 1998, class action filings against those companies increased by 338% in federal courts and by more than 1000% in state courts." (citing Federalist Society, *Analysis: Class Action Litigation–A Federalist Society Survey*, 1 Class Action Watch 1, 5 (1999); Deborah Hensler et al., *Preliminary Results of the Rand Study of Class Action Litigation*, 1997 Inst. Civ. Just. 15)).

The class action mechanism was not designed for the purpose of enabling industries to bring lawsuits such as the present case. As this Court emphasized in *Amchem Products, Inc. v. Windsor*, 521 U.S. 591 (1997), "the Advisory Committee had dominantly in mind vindication of 'the rights of groups of people who individually would be without effective strength to bring their opponents into court at all.'" *Amchem*, 521 U.S. at 617 (quoting Benjamin Kaplan, *A Prefatory Note*, 10 B.C. Ind. & Com. L. Rev. 497 (1969)). Indeed, Rule 23 was originally written to

encourage civil rights reform litigation and later expanded to facilitate access to the courts for litigants needing to pool small claims. *See The Class Action Fairness Act of 1999: Hearing on S. 353 Before the Subcomm. on Admin. Oversight and the Courts of the S. Comm. on the Judiciary*, 106th Cong. (1999) (statement of John P. Frank, Lewis and Roca, Phoenix, Arizona) ("If there was [a] single, undoubted goal of the committee, the energizing force which motivated the whole rule, it was the firm determination to create a class action system which could deal with civil rights and, explicitly, segregation."). As a glance at the caption of this case makes apparent, the present class action bears no resemblance to the lawsuits that are Rule 23's primary concern.

B. The Second Circuit's Standards For Class Certification Conflict With The Text Of Rule 23, With The Decisions Of This Court, And With Holdings Of Other Circuit Courts Of Appeals.

1. The propriety of class certification in the present case turns on whether, as required by Rule 23(b)(3), common questions of law and fact predominate, and on whether a class action is superior to other available methods of adjudication.[5] In the district court, Petitioners Visa and MasterCard presented compelling expert evidence that common questions did not predominate among members of the proposed class. For example, Petitioners' expert explained that, with respect to the injury-to-business-or-property element of plaintiffs' antitrust claims

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[5] Although the district court found that the class was certifiable under Rule 23(b)(2) as well as (b)(3), the Second Circuit declined to reach the (b)(2) issue. Pet. App. 33a. The Petition therefore does not raise that question.

(separate and apart from damages), the proposed class members differed markedly from each other. *See* Pet. App. 14a-15a, 45a-48a, 64a-65a, 80a-84a. [6]

Petitioners' extensive expert evidence in opposition to certification was offered in vain, however. Reciting that "'a motion for class certification is not an occasion for examination of the merits of the case,'" Pet. App. 11a (quoting *Caridad v. Metro-North Commuter R.R.*, 191 F.3d 283, 291 (2d Cir. 1999)), the Second Circuit affirmed the class certification based on its view that "a district court may not weigh conflicting expert evidence or engage in 'statistical dueling' of experts" at the certification stage. Pet. App. 12a (quoting *Caridad*, 191 F.3d at 292-93).[7]

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[6] This is not a case where only the issue of *damages* is unsusceptible to common proof or manageability. Rather, Respondents seek relief under a cause of action that requires, *as an element of liability itself*, that each plaintiff class member prove antitrust injury. *See* 15 U.S.C. § 15 (Section 4 of the Clayton Act, providing a cause of action for treble damages for "any person who shall be *injured in his business or property* by reason of anything forbidden in the antitrust laws" (emphasis added)). As the district court in this case recognized: "The *fact* of injury, which is required as an element of the plaintiff's claim, should not be confused with the *extent* of injury (as reflected by the amount of damages), which may not be amenable to establishment with great precision." Pet. App. 81a (citing *Kypta v. McDonald's Corp.*, 671 F.2d 1282, 1285 (11th Cir. 1982)). Because the fact of injury is an element of liability, it must be proved by common proof at the liability stage; the possibility of later decertification of the class (or division of the class into subclasses) for trials on damages does not cure the problem.

[7] The Second Circuit's approving quotations of formulations by federal district courts of the standard supposedly to be applied to the evaluation of evidence offered in support of certification suggest that the Second Circuit's standard is so easily met as barely to warrant the appellation "standard" at all:

In other words, according to the Second Circuit, a district court is not to weigh conflicting expert evidence on certification factors. Rather, as long as the expert evidence in favor of certification is not "fatally flawed" (*i.e.*, as long as such evidence is admissible), the court may rely upon the evidence as satisfying certification criteria if it finds that such expert evidence is "sufficient" to meet such criteria. Pet. App. 11a-12a. That is so even if judicial *evaluation* of competing evidence that the parties presented might have led to the conclusion that class certification should be denied.[8] Thus, the Second Circuit's standards enabled Respondents to obtain class certification without having to subject to judicial evaluation, much less decision, the serious questions raised by Petitioners' expert evidence.

2. The Second Circuit's approach is contrary to the plain terms of Rule 23(b)(3). That rule allows a lawsuit to be maintained as a class action only if the district court

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> *See . . . In re Disposable Contact Lens Antitrust Litig.*, 170 F.R.D. 524, 531-32 ([M.]D. Fla. 1996) (granting class certification upon finding that "Plaintiffs have demonstrated at least a 'colorable method' of proving [common injury] at trial"); *In re Potash Antitrust Litig.*, 159 F.R.D. 682, 687 (D. Minn. 1995) (stating that "in assessing whether to certify a class, the Court's inquiry is limited to whether or not the proposed methods are so insubstantial as to amount to no method at all").

Pet. App. 11a-12a.

[8] The Second Circuit in the present case also improperly postponed deciding whether the class was manageable, even though Rule 23 expressly lists manageability as a "matter pertinent to the findings" required for certification of a (b)(3) class action. *See* Fed. R. Civ. P. 23(b)(3)(D) (listing as a certification factor "the difficulties likely to be encountered in the management of a class action").

"finds" that common questions predominate and that the class action method is superior to other adjudication methods. The Rule enumerates four factors as "matters pertinent to the *findings*" (emphasis added). It is difficult to imagine what Rule 23 could contemplate in its repeated use of the word "find" other than a court's weighing of competing evidence offered in connection with the (b)(3) criteria. In the context of a "predominance" inquiry, this necessarily means that the court must evaluate expert testimony that the parties submit on whether common questions predominate.

Nor can the Second Circuit's approach be squared with this Court's decision in *Amchem*. *Amchem* explains that Rule 23(b)(3) requires a "court's 'close look' at the predominance and superiority criteria" and that "the predominance criterion [of Rule 23(b)(3)] is far more demanding" than Rule 23(a)'s threshold requirement that common questions simply exist. *Amchem*, 521 U.S. at 615, 623-24 (quoting Benjamin Kaplan, *Continuing Work of the Civil Committee: 1966 Amendments of the Federal Rules of Civil Procedure* (I), 81 Harv. L. Rev. 356, 390 (1967)). The Second Circuit's approach is overly deferential to the evidence put forth by plaintiffs, and, as a practical matter, eviscerates the "far more demanding" predominance criterion. In the Second Circuit, expert evidence need not be persuasive on the certification factors when measured against contrary evidence. Therefore, the Second Circuit's approach falls far short of the "findings" required by the text of the Rule and the "close look" demanded by *Amchem*.

Moreover, in the related context of "limited fund" class certification, this Court has held under Rule 23(b)(1)(B) that a district court must make "findings of fact" after a proceeding in which the evidence may be

challenged. *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 849 (1999). The Court so held in *Ortiz* even though the "limited fund" provision of the Rule does not use the term "findings," as Rule 23(b)(3) does.

The courts below did not undertake an independent evaluation as to whether, in light of contrary evidence presented by the defendants, Respondents had in fact demonstrated that common questions existed and predominated. An independent evaluation, which this Court has recognized that Rule 23 *requires* at the certification stage, surely mandates the very weighing of conflicting evidence that the Second Circuit in this case expressly stated was *forbidden* at the certification stage.

3. Contrary to the apparent supposition of the Second Circuit in the present case, Pet. App. 12a, a judicial "close look" into the Rule 23(b)(3) factors does not run counter to this Court's instruction in *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 177-78 (1974), that Rule 23 does not confer on district courts "authority to conduct a preliminary inquiry into the merits of a suit in order to determine whether it may be maintained as a class action." *Eisen*, 417 U.S. at 177. Indeed, this Court expressly stated in *Eisen* that the inquiries forbidden to a district court at the certification stage were "'whether the plaintiff or plaintiffs have stated a cause of action or will prevail on the merits,'" not "'whether the requirements of Rule 23 are met.'" *Id.* at 178 (quoting *Miller v. Mackey Int'l*, 452 F.2d 424, 427 (5th Cir. 1971) (Wisdom, J.)); *see also Eggleston v. Chicago Journeymen Plumbers' Local No. 130*, 657 F.2d 890, 895 (7th Cir. 1981) ("*Eisen* has not been interpreted so broadly . . . as to foreclose inquiry into whether plaintiff is asserting a claim which, assuming its merit, will satisfy the requirements of Rule 23 as distinguished from an inquiry into the merits of the plaintiff's particular individual

claim."); *accord Szabo v. Bridgeport Machs., Inc.*, 249 F.3d 672, 677 (7th Cir. 2001).

As the Seventh Circuit has observed, the inquiry and findings called for by Rule 23 are similar to other inquiries that district courts routinely make under Rules 12(b)(1) and 12(b)(2), notwithstanding that such inquiries may overlap in some respects with the merits of a case. For example, "[w]hen jurisdiction or venue depends on contested facts—even facts closely linked to the merits of the claim—the district judge is free to hold a hearing and resolve the dispute before allowing the case to proceed." *Szabo*, 249 F.3d at 676-77.

4. As further explained in the Petition, Pet. 14-20, this case presents a square conflict among numerous circuit courts of appeals that will likely lead to forum shopping among class action plaintiffs. *See* Robert G. Bone & David S. Evans, *Class Certification and the Substantive Merits*, 51 Duke L.J. 1251, 1256, 1257 n.12 (2002) (noting circuit conflict). In stark contrast to the Second Circuit's approach in the present case, the Seventh Circuit recently held that a district court at the certification stage "may not duck hard questions by observing that each side has some support." *West*, 282 F.3d at 938. The Seventh Circuit emphasized that "[t]ough questions must be faced and squarely decided, if necessary by holding evidentiary hearings and choosing between competing perspectives." *Id.* In light of the conflict among the courts of appeals that this case presents, as well as the inconsistencies between the Second Circuit's approach and not only the plain text of Rule 23(b)(3), but also this Court's decisions in *Amchem* and *Ortiz,* the Petition warrants this Court's review.

CONCLUSION

For the foregoing reasons, as well as those stated in the petition for a writ of certiorari, the petition should be granted.

Respectfully submitted,

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